[HIGH COURT OF AUSTRALIA.]

STAPLETON . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

ON APPEAL FROM THE COURT OF BANKRUPTCY, DISTRICT OF SOUTH QUEENSLAND.

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MELBOURNE, *Oct.* 7, 10, 11; 31.

Dixon C.J., McTiernan, Williams, Webb and Taylor JJ.

Income Tax (Cth.)—Assessment—Deceased estate being administered in bankruptcy —Commissioner to have same powers etc. against the "trustees of the estate of the taxpayer" as against taxpayer if still living—Tax payable by such trustees to be first charge on estate in their hands—Capacity in which liability imposed on trustees—"Estate of the taxpayer"—What comprised in—Assets charged in favour of third parties—Whether Official Receiver is trustee of "estate of taxpayer"—Provision under Income Tax Assessment Act for trustee within meaning of Bankruptcy Act to apply "estate of the bankrupt" in payment of tax due in priority to all other unsecured debts except those referred to in certain provisions in Bankruptcy Act—Whether Income Tax Assessment Act provision an amendment of Bankruptcy Act provision—"Estate of the bankrupt"—Meaning of words—Administration order—Effect—Whether to make deceased debtor a bankrupt.

Income Tax Assessment Act 1936-1953 (*No.* 27 *of* 1946—*No.* 28 *of* 1953), *ss.* 216, 221 (1) (*b*) (i)—*Bankruptcy Act* 1924-1950 (*No.* 37 *of* 1924—*No.* 80 *of* 1950), *ss.* 84, 155.

Section 216 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 provides as follows:—"The following provisions shall apply in any case where, whether intentionally or not, a taxpayer escapes full taxation in his lifetime by reason of not having duly made full complete and accurate returns. (*a*) The Commissioner shall have the same powers and remedies against the trustees of the estate of the taxpayer in respect of the taxable income of the taxpayer as he would have against the taxpayer if the taxpayer were still living. (*b*) The trustees shall make such returns as the Commissioner requires for the purpose of an accurate assessment. (*c*) The trustees shall be subject to additional tax to the same extent as the taxpayer would be subject to additional tax if he were still living: Provided that the

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Commissioner may in any particular case, for reasons which he thinks sufficient, remit the additional tax or any part thereof. (*d*) The amount of any tax payable by the trustees shall be a first charge on all the taxpayer's estate in their hands ".

Held (1) That an assessment validly made under s. 216 constitutes a debt owing by the estate, liability being imposed on the trustees in a representative capacity only.

(2) That the " estate of the taxpayer " referred to is the estate which passes to personal representatives on death. The Official Receiver in Bankruptcy is not such a trustee. Where assets are charged the taxpayer is entitled to them subject to the charge and it is only his interest in them which forms part of his estate.

Section 155 of the *Bankruptcy Act* 1924-1950 provides :—" (1) Any creditor or creditors of a deceased debtor whose debt or debts owing to him or them would have been sufficient to support a bankruptcy petition against him, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration in bankruptcy of the deceased debtor's estate. (4) With the modifications mentioned in this section, all the provisions of this Act relating to the administration of the property of a bankrupt and to trustees shall, so far as they are applicable, apply to the case of an order for administration under this section in like manner as to a sequestration order. (4A) The provisions of section eighty of this Act and the provisions of Division 4 Part VI. of this Act shall, so far as they are applicable, apply to the case of an order for administration under this section in like manner as to a sequestration order." Section 221 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 provides :—" For the better securing to the Commonwealth of the revenue required for the purposes of the Commonwealth—(*a*) . . . (*b*) notwithstanding anything contained in any other Act or State Act—(i) a person who is a trustee within the meaning of the *Bankruptcy Act* 1924-1933 shall apply the estate of the bankrupt in payment of tax due under this Act (whether assessed before or after the date of the order of sequestration) in priority to all other unsecured debts other than debts of the classes specified in paragraphs (*a*), (*d*) or (*e*) of sub-section (1) of section eighty-four of that Act ".

Held (1) that although the provisions of s. 221 (1) (*b*) (i) purport to override the provisions of s. 84 of the *Bankruptcy Act* in particular circumstances it is not an amendment of that section nor does it form part of the *Bankruptcy Act*; (2) that an order for administration under s. 155 of the *Bankruptcy Act* is not a sequestration order nor is or was the deceased debtor a bankrupt. Section 221 (1) (*b*) (i) can accordingly have no application to an estate the subject of an administration order because there is no " estate of the *bankrupt* ".

Decision of the Court of Bankruptcy, District of South Queensland (*Mansfield* S.P.J.), reversed.

APPEAL from the Court of Bankruptcy, District of South Queensland.

William Fox, otherwise known as William Rankin died on 7th June 1951. Probate of his will was granted by the Supreme Court of Queensland on 31st October 1951 to the executors named therein, Douglas Wadley and George Edward Martin. On 3rd July 1953 the executors presented a petition under s. 156 of the *Bankruptcy Act* and on the same date an administration order was made under the said section, and Leslie Thomas Stapleton, the official receiver in bankruptcy, was appointed the trustee of the estate.

For many years prior and up to his death, the deceased carried on business as a Golden Casket agent and starting-price bookmaker. In addition he was interested in a number of other activities including land syndicates at Southport, and the purchase of goods from the Disposals Commission. Between the years 1935-1939, the accountancy firm of O'Hare & Martin, of which George Edward Martin, one of the executors above-mentioned, was a member, kept the books of account relating to the land syndicates. In 1941 the deceased approached O'Hare & Martin and requested assistance in connection with an investigation of the deceased's affairs by an inspector of the Income Tax Department. This assistance was given and the firm was then engaged by the deceased to do all his accounting work and to prepare his income tax returns. This work was actually done by Mr. Martin. The balance sheet of the deceased's assets which had been prepared by the inspector in 1941, was taken as a basis upon which to work, and thereafter books of account were kept of the Golden Casket business and the land syndicates at Southport. Concerning these two activities full information was given by the deceased to Martin but, in relation to his other activities, full information sufficient to enable complete books of account to be kept was not made available by the deceased.

When the income tax returns of the deceased were being prepared, Martin had before him the books of account and copies of the deceased's various bank accounts. When items were found in the bank accounts the source of which was not known, they were collected in what was termed a "settling account". Any other assets found in the possession of the deceased, the source of which was not known, were also included in the "settling account". This account was then referred to the deceased, and any item in relation to which he could give no explanation showing that it was capital or the property of some other person was then included by Martin in the income tax return as income. This practice was followed in the years relevant to this matter during which the deceased was alive. After his death the executors followed the

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previous practice in relation to the collection of various moneys and other assets as to the source of which they had no knowledge, and the return lodged by them for the period 1st July 1950 to 7th June 1951 (the date of death) showed the following item—" suspense account £57,437 1s. 10d." This account included all moneys in relation to various transactions of the deceased of which the executors of his estate had no knowledge as to the source from which such sums were obtained. Particulars were then given showing how the amount is made up.

As a consequence of investigations made by the Commissioner of Taxation after the death of the deceased, re-assessments dated 4th August 1953 of tax due by the deceased were made and the following amounts were shown therein as being payable :—

Increased Amended Social Services Contribution 1945-1946	£295	0	0
Additional Tax for Omission	70	1	0
Increased Amended Federal Income Tax 1945-1946	6,569	1	0
Additional Tax for Omission	1,560	3	0
Increased Amended Social Services Contribution 1946-1947	47	15	0
Additional Tax for Omission	9	16	0
Increased Amended Federal Income Tax 1946-1947	456	9	0
Additional Tax for Omission	93	2	0
Increased Amended Social Services Contribution 1948-1949	243	7	0
Additional Tax for Omission	31	8	0
Increased Amended Federal Income Tax 1948-1949	2,186	6	0
Additional Tax for Omission	282	7	0
Increased Amended Social Services Contribution 1949-1950	2,059	5	0
Additional Tax for Omission	145	17	0
Increased Amended Federal Income Tax 1949-1950	17,033	18	0
Additional Tax for Omission	1,206	11	0
	£32,290	6	0

For the period 1st July 1950 to 7th June 1951 the balance owing for income tax and social services contribution was assessed at £21,170 5s. 0d. making a total with the items above enumerated

of £53,460 11s. 0d. Each assessment was addressed to " Official Receiver in Bankruptcy (as Trustee in Estate of William Fox, dec'd.)."

A proof of debt for the amount of £53,460 11s. 0d. was lodged on 4th August 1953 on behalf of the Commissioner of Taxation. On 29th July 1954 the Commissioner of Taxation wrote to the official receiver a letter which, omitting formal parts, read as follows :—" With reference to my proof of debt dated 4th August 1953, you are advised that priority for payment of the tax as stated therein is claimed on the ground that, pursuant to the provisions of s. 216 (*d*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953, the debt is secured upon the whole of the estate and for the purposes of this claim the security is valued at £53,460 11s. 0d."

By notice of rejection dated 28th September 1954, the official receiver rejected the claim of the commissioner against the estate for priority on the grounds stated below, and admitted it as an ordinary unsecured claim for the full amount. The said grounds were :—

1. Section 5 (3) of the *Bankruptcy Act* 1924-1950 provides that the *Bankruptcy Act* shall bind the Crown " relating to the remedies against the property of a debtor, the priority of debts . . . ". 2. Section 84 (1) (*h*) of the *Bankruptcy Act* provides certain priorities which apply only to tax assessed prior to the order of sequestration, and as in this case assessments were not issued until after the administration order was made, no priority can be granted under this section. 3. Section 221 of the *Income Tax and Social Services Contribution Assessment Act* provides certain specific priorities beyond those provided by the *Bankruptcy Act*. This s. 221 specifically over-rides the *Bankruptcy Act*, but it grants no priority in the case of a deceased estate. 4. Section 216 (*d*) of the *Income Tax and Social Services Contribution Assessment Act* has no effect in an administration in bankruptcy because, *inter alia*, of the provisions of s. 5 (3) of the *Bankruptcy Act*.

The commissioner being dissatisfied with the decision of the official receiver, on 19th November 1954, lodged in the Bankruptcy Court a notice of motion which, as subsequently amended, sought the following orders :—

1. (a) An order that the decision of the official receiver made on 28th September 1954 that s. 216 (*d*) of the *Income Tax and Social Services Contribution Assessment Act* has no effect in an administration in bankruptcy because, *inter alia*, of s. 5 (3) of the *Bankruptcy Act* be reversed. (b) A declaration that the taxes referred to above

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amounting to a total of £53,460 11s. 0d. are and were at all material times a first charge by virtue of the provisions of s. 216 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 on all the estate of the said William Fox deceased, that is, or has at any material time been or will at any material time be in the hands of the said official receiver. (c) A declaration that the said official receiver should have paid and should pay to the Commissioner of Taxation the said amounts of tax in priority to all other creditors secured or otherwise in the said estate and in priority to all payments set out in s. 84 (1) of the *Bankruptcy Act*. (d) An order that the official receiver do pay to the Commissioner of Taxation the sum of £53,460 11s. 0d. 2. Further or alternatively that the decision of the official receiver made on 28th September 1954 be reversed on the ground that by virtue of s. 221 (*b*) (i) of the *Income Tax and Social Services Contribution Assessment Act* the said Commissioner of Taxation is entitled to certain priority of payment in respect of the said claim and that the said official receiver be directed to admit the said proof of debt at the amount of £53,460 11s. 0d. to rank for payment in priority to all other unsecured debts other than debts of the classes specified in pars. (*a*), (*d*) or (*e*) of sub-s. (1) of s. 84 of the *Bankruptcy Act* 1924-1950. 3. Further or alternatively that as to any amount or amounts which may not be the subject of an effective first charge under the provisions of s. 216 of the *Income Tax and Social Services Contribution Assessment Act* a declaration that the commissioner is entitled to be paid any such amount or amounts in priority to all other unsecured debts other than debts of the classes specified in pars. (*a*), (*d*) or (*e*) of sub-s. (1) of s. 84 of the *Bankruptcy Act* 1924-1950 upon his taking all necessary steps. 4. Further a declaration that the said official receiver is by virtue of the operation of s. 221 (*b*) (i) of the *Income Tax and Social Services Contribution Assessment Act* bound to apply the provisions of that section independently of any requirement of the *Bankruptcy Act* or of the rules made thereunder.

The motion was heard before *Mansfield* S.P.J. who held that the commissioner was entitled to priority by virtue of s. 221 (*b*) (i) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953, the extent of his priority being the whole amount of tax assessed and then outstanding. His Honour reversed the decision of the official receiver as contained in the letter and notice, both dated 28th September 1954, rejecting the commissioner's claim to priority and admitting his proof as an ordinary unsecured claim for the sum of £53,460 11s. 0d., and directed the official

receiver to admit the commissioner's claim to priority in accordance with the provisions of s. 221 (*b*) (i) for the amount of £53,460 11s. 0d. His Honour, however, rejected the commissioner's claim under s. 216 (*d*) of such Act to a first charge on all the assets of the deceased in the hands of the official receiver at the time of the making and notification of the assessments.

From this decision the official receiver appealed, and the Commissioner of Taxation gave notice of cross-appeal, to the High Court.

The relevant statutory provisions appear sufficiently in the judgment of the Court hereunder.

C. G. Wanstall, for the appellant. It is necessary to distinguish between a sequestration order and an administration order. The phrase " estate of the bankrupt " in s. 221 (*b*) (i) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 does not include the estate of a deceased debtor which is being administered under Pt. X of the *Bankruptcy Act* because the deceased never was a bankrupt. A statute imposing taxation is to be strictly construed. [He referred to *Partington* v. *Attorney-General* (1); *Canadian Eagle Oil Co. Ltd.* v. *The King* (2).] The word " bankrupt " in s. 221 (*b*) (i) of the *Income Tax and Social Services Contribution Assessment Act* has no meaning except that which is given to it under the *Bankruptcy Act*. [He referred to *In re Leng*; *Tarn* v. *Emmerson* (3); *R.* v. *Adams* (4); *Reg.* v. *Davison* (5).] Part X of the *Bankruptcy Act* 1924-1950 does not equate the position of a deceased debtor to that of a bankrupt except for the purposes of administration. Section 221 of the *Assessment Act* is not an amendment of the *Bankruptcy Act* so as to become part of that Act for the purposes of s. 155. Section 15 of the *Acts Interpretation Act* 1901-1950 is not applicable because there is a contrary intention shown in s. 221 (*b*) (i) of the *Assessment Act* by the use of the phrases " the estate of the bankrupt " and " order of sequestration ". These phrases are used in the *Bankruptcy Act* in a restricted and well defined way. [He referred to *Lennon* v. *Gibson & Howes Ltd.* (6); *Graham* v. *Paterson* (7).] Even if s. 221 (*b*) (i) of the *Assessment Act* is applicable in this case it does not authorize the imposition of additional tax or penalties.

(1) (1869) L.R. 4 H.L. 100, at p. 122.
(2) (1946) A.C. 119, at p. 140.
(3) (1895) 1 Ch. 652, at pp. 655, 659, 660.
(4) (1935) 53 C.L.R. 563, at pp. 567, 568.
(5) (1954) 90 C.L.R. 353.
(6) (1919) A.C. 709.
(7) (1950) 81 C.L.R. 1, at pp. 17, 18, 23.

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G. L. Hart Q.C. (with him *E. J. Moynahan*), for the respondent. Section 216 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 applies to this case. The official receiver is a trustee within the meaning of the section. [He referred to *Lloyd* v. *Federal Commissioner of Land Tax* (1).] The assessments impose an original liability on the official receiver personally as a trustee of the estate. The deceased Fox was not indebted to the respondent at the date of his death and thereafter he could not be subject to taxation. [He referred to *Commissioner of Taxes (S.A.)* v. *Executor Trustee & Agency Co. of South Australia Ltd.* (2); *Aitken* v. *Federal Commissioner of Taxation* (3); *Patterson* v. *Federal Commissioner of Taxation* (4); *Commissioner of Stamps (W.A.)* v. *West Australian Trustee, Executor & Agency Co. Ltd.* (5).] Inasmuch as the deceased was not indebted to the respondent, the respondent cannot prove in bankruptcy in respect of the amounts due on the assessments. Section 216 of the *Assessment Act* contemplates that the trustee to be assessed will be the trustee holding the assets as at the date of assessment. The assessments are binding on the official receiver who has not appealed against them. [He referred to *R.* v. *Agricultural Land Tribunal (South Eastern Area)*; *Ex parte Hooker* (6); *George* v. *Federal Commissioner of Taxation* (7); *Scarfe* v. *Federal Commissioner of Taxation* (8).] The tax payable under the assessments is payable as part of the cost of administration under s. 84 (1) of the *Bankruptcy Act*. [He referred to *Lloyd* v. *Federal Commissioner of Land Tax* (9); *In re Beni-Felkai Mining Co.* (10).] The nature of the charge given to the respondent is shown by the following cases. [He referred to *Melbourne Tramways Trust* v. *Melbourne Tramway & Omnibus Co. Ltd.* (11); *Benalla Waterworks Trust* v. *Swain* (12); *Re Price*; *Ex parte Tinning* (13).] *Re Mageed Rasheed*; *The Trustee* v. *Executor Trustee & Agency Co. of South Australia Ltd.* (14) appears to correctly lay down the law: see *Dowse* v. *Gorton* (15). The appellant is personally liable for a sum paid off to the Commercial Bank of Australia in priority to the respondent after the date of assessment. The bank was a secured creditor at the time of the administration order, with a

(1) (1933) 49 C.L.R. 160.
(2) (1938) 63 C.L.R. 108, at pp. 146-148.
(3) (1936) 56 C.L.R. 491, at pp. 500, 502, 504, 505.
(4) (1936) 56 C.L.R. 507, at pp. 514, 515, 518.
(5) (1926) 38 C.L.R. 63, at p. 72.
(6) (1952) 1 K.B. 1.
(7) (1952) 86 C.L.R. 183, at pp. 206, 207.
(8) (1920) 28 C.L.R. 271, at p. 277.
(9) (1933) 49 C.L.R. 160, at p. 170.
(10) (1934) Ch. 406, at p. 418.
(11) (1887) 13 V.L.R. 487, at p. 490.
(12) (1900) 26 V.L.R. 449.
(13) (1931) 4 A.B.C. 94, at p. 96.
(14) (1933) 7 A.B.C. 82, at p. 92.
(15) (1891) A.C. 190.

mortgage over certain land. [He referred to *Partridge* v. *McIntosh & Sons Ltd.* (1); *Wing On & Co. Ltd.* v. *Collector of Customs (N.S.W.)* (2).] If there is any conflict between the *Bankruptcy Act* and the *Assessment Act*, the provisions of the latter Act prevail. Prior to the enactment of s. 5 (3) of the *Bankruptcy Act* the Crown had priority in respect of debts owing to it. [He referred to *New South Wales Taxation Commissioners* v. *Palmer* (3).] The *Bankruptcy Act* is to be construed in favour of the Crown. [He referred to *Deputy Federal Commissioner of Taxation* v. *Stranger* (4).] The *Assessment Act* is later and more particular than the *Bankruptcy Act*. Alternatively the tax constitutes a debt which is provable in bankruptcy under s. 81 of the *Bankruptcy Act*. [He referred to *Halsbury's Laws of England*, 3rd ed., vol. 2, p. 464, par. 912; *In re Higginson & Dean*; *Ex parte Attorney-General* (5).] The respondent is given priority here by s. 221 (*b*) (i) of the *Assessment Act*. The words " this Act " in s. 155 (4) of the *Bankruptcy Act* mean " this Act as it is in force for the time being ". The scheme of the *Bankruptcy Act* is to create uniformity between the consequences of a sequestration order and an administration order. If a new provision, such as s. 221 (*b*) (i) of the *Assessment Act*, alters the priorities in s. 84 of the *Bankruptcy Act* and is silent on whether it is to apply in the case of administration under Pt. X, then it is to be taken to apply. Section 221 (*b*) (i) of the *Assessment Act* amends s. 84 of the *Bankruptcy Act* and by virtue of s. 15 of the *Acts Interpretation Act* 1901-1950 is to be construed as part of the latter Act. By s. 12 of the *Acts Interpretation Act* every section of an Act has the effect of a substantive enactment. In s. 221 (*b*) (i) the word " bankrupt " has a wider meaning than that attached to the word by the *Bankruptcy Act*: see *Stroud's Judicial Dictionary*, 3rd ed. (1952), vol. 1, p. 261, " bankrupt ". The phrase " order of sequestration " used in the section is not the same as " sequestration order " which is used in the *Bankruptcy Act* and, it is submitted, has a larger meaning: see *Stroud's Judicial Dictionary*, 3rd ed. (1952), vol. 4, pp. 2716, 2717, " sequestration ". If this estate had never been administered in bankruptcy s. 221 (*b*) (i) of the *Assessment Act* would have applied to it. [He referred to *Re Canada Cycle & Motor Agency (Queensland) Ltd.* (6).] Section 221 (*b*) (i) authorizes the imposition of additional tax. [He referred to *Richardson* v. *Federal Commissioner of Taxation* (7).]

(1) (1933) 49 C.L.R. 453, at pp. 461, 466, 472.
(2) (1938) 60 C.L.R. 97, at pp. 107, 109, 110.
(3) (1907) A.C. 179.
(4) (1934) 50 C.L.R. 468, at p. 473.
(5) (1899) 1 Q.B. 325, at p. 333.
(6) (1931) Q.S.R. 281.
(7) (1932) 48 C.L.R. 192, at pp. 207 et seq.

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[TAYLOR J. Assuming that s. 216 of the *Assessment Act* does not apply where both death and administration in bankruptcy have supervened and that s. 221 (*b*) (i) applies only to bankruptcies strictly so-called, can you refer to any other provision in the Act which would authorize the making of the assessments here ?]

No, but the question does not arise, because the proof of debt has been admitted.

C. G. Wanstall, in reply. Section 216 of the *Assessment Act* 1936-1953 does not apply here. The official receiver is not a trustee within the meaning of the section. The character of the provisions contained in the section suggests that the persons intended to be included in the meaning of the word " trustee " are representatives in a real sense of the debtor. The official receiver is not such a person. [He referred to *Howey* v. *Federal Commissioner of Taxation* (1); *Deputy Federal Commissioner of Taxation* v. *Trustees of the Wheat Pool of Western Australia* (2); *Manning* v. *Federal Commissioner of Taxation* (3).] The phrase " first charge on all the taxpayer's estate in their hands " in s. 216 indicates that the section does not include the trustee in bankruptcy because the property in the hands of such a trustee or a trustee under an administration order is not the taxpayer's estate. Section 60 of the *Bankruptcy Act* vests the " property " of the bankrupt in the official receiver. The property is subject to rights subsisting in other persons. [He referred to *Lloyd* v. *Public Trustee* (*N.S.W.*) (4); *Vacuum Oil Co. Pty. Ltd.* v. *Wiltshire* (5).]

Cur. adv. vult.

Oct. 31.

THE COURT delivered the following written judgment :—

On 7th June 1951 the above-named William Fox died and on 31st October in the same year probate of his will was granted by the Supreme Court of Queensland to the executors therein named. The deceased died owing a number of debts and nearly three years later, on 3rd July 1953, the executors, pursuant to s. 155 of the *Bankruptcy Act* 1924-1950, presented to the Court of Bankruptcy for the District of Southern Queensland a petition " praying for an order for the administration in bankruptcy of the deceased debtor's estate ". On the same day such an order was made and, pursuant to sub-s. (5) of that section, the property of the debtor vested in the above-named appellant, the official receiver for the

(1) (1930) 44 C.L.R. 289, at p. 293.
(2) (1932) 48 C.L.R. 5, at pp. 14, 15.
(3) (1928) 40 C.L.R. 506, at p. 509.
(4) (1930) 44 C.L.R. 312, at p. 316.
(5) (1945) 72 C.L.R. 319, at pp. 336, 337.

above-named bankruptcy district, as trustee thereof. Thereafter, on 4th August 1953, the respondent issued notices of amended assessments purporting to assess the " Official Receiver in Bankruptcy " as " Trustee in Estate of William Fox, dec'd." for income tax, social services contribution and additional tax for the years ended 30th June 1946, 1947, 1949 and 1950. The amounts for which the appellant was assessed for these years were respectively £8,494 5s. 0d., £607 2s. 0d., £2,743 8s. 0d. and £20,445 11s. 0d. On the same day an original assessment in respect of the income of the deceased from 1st July 1950 up to the date of his death was also issued. This assessment was for the sum of £21,170 5s. 0d. The total of these assessments was £53,460 11s. 0d. and to the extent of this sum the respondent claims a first charge on all the assets which, by virtue of the order above referred to, vested in the hands of the official receiver. Alternatively, it is claimed on behalf of the respondent that he is entitled to prove against the estate for this amount in priority to all unsecured creditors except those claiming in respect of debts to which priority is given by pars. (*a*), (*d*) and (*e*) of sub-s. (1) of s. 84 of the *Bankruptcy Act*. The claims of the respondent were rejected by the appellant who admitted the respondent's proof " as an ordinary unsecured claim for the amount of £53,460 11s. 0d."

The alternate claims of the respondent were founded upon the provisions of s. 216 (*d*) and s. 221 (*b*) (i) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953, and it is desirable that the relevant provisions should be set out: " 216. The following provisions shall apply in any case where, whether intentionally or not, a taxpayer escapes full taxation in his lifetime by reason of not having duly made full complete and accurate returns:— (*a*) the commissioner shall have the same powers and remedies against the trustees of the estate of the taxpayer in respect of the taxable income of the taxpayer as he would have against the taxpayer if the taxpayer were still living. (*b*) The trustees shall make such returns as the commissioner requires for the purpose of an accurate assessment. (*c*) The trustees shall be subject to additional tax to the same extent as the taxpayer would be subject to additional tax if he were still living: Provided that the commissioner may in any particular case, for reasons which he thinks sufficient, remit the additional tax or any part thereof. (*d*) The amount of any tax payable by the trustees shall be a first charge on all the taxpayer's estate in their hands ".

" 221. For the better securing to the Commonwealth of the revenue required for the purposes of the Commonwealth—(*a*) . . .

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(*b*) notwithstanding anything contained in any other Act or State Act—(i) a person who is a trustee within the meaning of the *Bankruptcy Act* 1924-1933 shall apply the estate of the bankrupt in payment of tax due under this Act (whether assessed before or after the date of the order of sequestration) in priority to all other unsecured debts other than debts of the classes specified in paragraphs (*a*), (*d*) or (*e*) of sub-section (1) of section eighty-four of that Act ".

As will be seen from a perusal of these provisions s. 221 alone expressly applies to cases where bankruptcy has occurred whilst a liability for tax, whether assessed or not, remains outstanding. The earlier section is in quite general terms and applies where a taxpayer has died before full assessment to income tax in respect of his income during his lifetime if he has escaped full assessment in his lifetime by reason of not having made full, complete and accurate returns.

Following the decision of the appellant to admit the proof of the respondent in competition with the ordinary creditors of the deceased the latter, in proceedings before the Bankruptcy Court, sought and obtained a declaration that to the extent of the total sum previously mentioned he was entitled to a priority of the character specified in s. 221 (*b*) (i). He was, however, unsuccessful in the contention, then advanced, that, pursuant to s. 216 (*d*), he was entitled to a first charge on all the assets in the hands of the appellant at the time when the assessments were made and notified. From the order of the Bankruptcy Court which, to the extent indicated, reversed the decision of the appellant this appeal is brought and the respondent, by cross-appeal, challenged the decision of that court that s. 216 had no application in determining the extent, if any, to which he is entitled to receive payment in priority to other creditors, secured and unsecured, of the deceased.

Before proceeding to discuss whether the circumstances of this case are apt to invoke the application of either section it is desirable that something should be said concerning par. (*d*) of the earlier section. The respondent has contended that the "first charge on all the taxpayer's estate " which that paragraph purports to create in appropriate circumstances is a charge which takes priority over every other charge or encumbrance on the property vested in the deceased immediately before his death or in his trustees immediately before the making of the order of administration. The contention proceeds upon the assumption that the " estate " of the deceased includes all such property. With one qualification which will presently appear it may, in one sense, be said that it does;

it may, perhaps, be called his gross estate. But the expression " all the taxpayer's estate " is a compendious term comprehending that to which he was entitled at his death and where assets are charged he is entitled to them subject only to the charge and it is his interest in such assets which forms part of his estate. But, however this may be, it is quite clear that, if s. 216 applies where both death and an administration order intervene before assessment to tax on some part of the deceased's income, the estate of the deceased in the hands of the official receiver for the purposes of that section is constituted by the assets which pass to him " subject to all liens, charges and rights subsisting in other persons " (*Hasluck* v. *Clark* (1); *Lloyd* v. *Public Trustee* (*N.S.W.*) (2) and *Vacuum Oil Co. Pty. Ltd.* v. *Wiltshire* (3)). It follows from this that if s. 216 applies in the circumstances of this case the degree of priority which it gives is little or no higher than that given by s. 221 (*b*) (i) in the cases in which it applies.

Examination of the effect of the sections discloses good reason for supposing that the earlier section was not intended to give any higher degree of priority than this. The latter section would, of course, apply in the case of a taxpayer who, up to the making of a sequestration order against him, has escaped full taxation by reason of not having made full, complete and accurate returns. Should bankruptcy intervene the commissioner would be entitled after assessment to prove in the bankrupt estate in priority to all unsecured debts other than those specified in the section. But if, no sequestration order having been made in the taxpayer's lifetime, an administration order were made after his death, the commissioner would, on the argument presented on his behalf, be entitled to receive payment in priority to all creditors whether secured or not. In other words, the commissioner would, in the latter circumstances, be entitled to have, not only the deceased's " property ", but also " property " belonging to persons other than the deceased appropriated in payment of the assessment. No suggestion was made why any such distinction should be made and we are satisfied that the language of s. 216, if it applies in such a case as this, does not produce that result.

These considerations dispose of the reason for regarding the respondent's claim for priority under that section as his primary claim and, that being so, it is convenient for the purpose of discussing the meaning and effect of the two sections with which the Court is concerned, to go at once to s. 221, for its provisions purport to deal

(1) (1899) 1 Q.B. 699, at p. 707.
(2) (1930) 44 C.L.R. 312, at p. 316.
(3) (1945) 72 C.L.R. 319, at pp. 336, 337.

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with the position of persons who are trustees within the meaning of the *Bankruptcy Act*.

That the appellant is and was such a trustee is beyond question and there is little room for doubt that for, at least, many of the purposes of the *Bankruptcy Act* he may properly be regarded as the " trustee of the bankrupt's estate ". By sub-s. (5) of s. 155 of that Act the effect of the making of an order for the administration of a deceased debtor's estate is to vest the property of the debtor in the official receiver as trustee thereof. Sub-section (4) provides that with the modifications mentioned in the section all the provisions of the Act *relating to the administration of the property of a bankrupt* and to trustees shall, so far as they are applicable, apply to the case of an order for administration under this section in like manner as to a sequestration order and by sub-s. (4A) the provisions of s. 80 of the Act and those of Div. 4 of Pt. VI of the Act shall, so far as they are applicable, apply to the case of an order for administration in like manner as to a sequestration order. Reference to Div. 4 of Pt. VI of the Act shows that many of the provisions therein contained are incapable of application in cases where orders have been made under s. 155 unless the deceased is regarded as a debtor and the order regarded as a sequestration order. This, of course, carries with it the notion that the deceased should be regarded for the purposes of the administration in bankruptcy as having attained posthumously the status of a bankrupt though many of the provisions of the Act relating to bankrupts could not take effect (cf. *R.* v. *Adams* (1)). But although these conceptions are necessary if effect is to be given to the directions contained in sub-ss. (4) and (4A) of s. 155 the fact is that an order for administration under that section is not a sequestration order nor is, or was, the deceased debtor a bankrupt. In these circumstances it is difficult to see how s. 221 (*b*) (i) of the *Income Tax and Social Services Contribution Assessment Act* can have any application to this case. It requires a person who is a trustee within the meaning of the *Bankruptcy Act* to apply the estate of the *bankrupt* in payment of tax due under the Act (whether assessed before or after the date of the *order of sequestration*) in priority to certain other debts but it does not follow that, because s. 155 of the *Bankruptcy Act* assimilates the estate of a deceased debtor to the position of the estate of a bankrupt for purposes of administration, this is so for the purposes of any other Act. Indeed, even if s. 155 of the *Bankruptcy Act* provided that upon the making of an administration order the debtor should be deemed for the purposes of that

(1) (1935) 53 C.L.R. 563.

Act to be a bankrupt and that, for the like purposes, the administration order should be deemed to be a sequestration order the case of the respondent would not be advanced. The fiction would be introduced for a limited purpose and the use of the word " bankrupt " and of the expression " sequestration order " in another statute would not constitute either a reference to a deceased debtor or to an order under s. 155. At the most the provisions of that section go no further than this and there is, therefore, no warrant for concluding that the deceased is or was a bankrupt or that the order for administration was a sequestration order within the meaning or for the purposes of s. 221 (*b*) (i) of the *Income Tax and Social Services Contribution Assessment Act*.

The provisions of s. 15 of the *Acts Interpretation Act* 1901-1950 are of no avail to the respondent on this point nor is the suggestion that s. 221 (*b*) (i) operates as an amendment of and, therefore, as part of s. 84 of the *Bankruptcy Act*. The effect of this submission, if accepted, would be firstly, to incorporate s. 221 (*b*) (i) into s. 84 of the *Bankruptcy Act* as a provision relating to the administration of bankrupt estates and, secondly, to render it applicable in the administration of a deceased estate as one of " the provisions of this Act " pursuant to sub-s. (4) of s. 155. But although the provisions of s. 221 (*b*) (i) purport to override the provisions of s. 84 in particular circumstances it is not an amendment of that section nor can it, on any view, be taken to form part of the *Bankruptcy Act* or to constitute one of its provisions. The paragraph operates to override, *pro tanto*, anything contained in any other federal or State Act. It could not amend a State Act. It could only invalidate it under s. 109 of the Constitution to the extent of the inconsistency. The provisions of the paragraph are intended to override any inconsistent provisions in any other Act, State or federal, and not to amend any of these Acts. The paragraph was introduced into the *Income Tax Assessment Act* by the *Income Tax Assessment Act* (No. 22 of 1942). Section 1 (3) of the latter Act provides that the principal Act as amended by this Act may be cited as the *Income Tas Assessment Act* 1936-1942. It is therefore expressed to be an amendment of the *Income Tax Assessment Act* and s. 15 of the *Acts Interpretation Act* would apply to it as an amendment of this Act and would not make it part of some other Act. The inescapable conclusion is that no degree of priority is granted to the respondent by s. 221 (*b*) (i) in the circumstances of this case.

The next contention with which it is necessary to deal is that the respondent is entitled under s. 216 to a first charge on all the deceased's estate in the appellant's hands pursuant to s. 216 (*d*).

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That section applies in any case where, whether intentionally or not, "a taxpayer escapes full taxation in his lifetime by reason of not having made full, complete and accurate returns" and for the purposes of considering the validity of this contention it may be assumed that this is such a case. It is, therefore, a case in which the respondent has the same powers and remedies against the trustees of the estate of the deceased in respect of the taxable income of the deceased as he would have had against the deceased if he were still living. By the relevant provisions of s. 216 (*a*) the respondent was, as we understand them, authorized for all purposes relating to the assessment and recovery of tax to regard the trustee or trustees of the deceased's estate as if they were the deceased himself. He might assess the trustees of the estate and proceed against them for the recovery of tax though he could not, of course, recover from them anything in excess of the value of the assets in their hands at the time of the assessment or coming to their hands thereafter (cf. *Patterson* v. *Federal Commissioner of Taxation* (1)). In addition, the respondent, by virtue of s. 216 (*d*) is given a first charge "on all the taxpayer's estate in their hands". It was said in the course of argument that the liability of the trustees in such a case is an original and independent liability and, therefore, that it does not constitute a debt provable in the course of a bankruptcy administration but this view must be rejected. The section contemplates the imposition of a liability upon the trustees who represent the deceased taxpayer, the amount of the assessment is enforceable only to the extent of the trust estate in their hands and payment to this extent is secured by a charge on the estate. The liability is one which is imposed upon them in a representative capacity and is truly one which fastens on the estate itself. These considerations dispose entirely of the suggestion that an assessment validly made under s. 216 does not constitute a debt owing by the estate.

From what has been said it is apparent that had an assessment been made before the making of the order for administration in bankruptcy the respondent would have been entitled to a first charge, in the sense already indicated, on all the assets then in, or thereafter coming to the hands of, the executors and that he might thereupon have taken steps to enforce it. Subsequently, upon the making of the order for administration, he might have claimed priority by virtue of the charge previously acquired. But this was not the sequence of events. The order for administration preceded the assessment, the latter being made at a time when by

(1) (1936) 56 C.L.R. 507, at pp. 518, 519.

virtue of s. 155 (5) of the *Bankruptcy Act* the property of the deceased debtor had vested in the appellant " as trustee thereof " whose duty it became to " proceed forthwith to realise and distribute the same in accordance with the provisions of " the Act. It is perhaps of some importance to observe that the property which vests pursuant to this sub-section is the " property of the bankrupt " within the meaning of s. 91 of the *Bankruptcy Act* and that, therefore, there may in any particular case be a residue of property which will not pass from a deceased debtor's executors to the official receiver. Moreover, notwithstanding the effect of the order in transferring property from the executors to the official receiver the former will remain the representatives of the deceased and will continue to hold any such residue. They will, momentarily at least, succeed to any after acquired property and it will be to them that any surplus remaining after completion of the administration in bankruptcy will pass.

In these circumstances the question now is whether the appellant became, within the meaning of s. 216, " the trustee of the estate of the taxpayer ". In our view he did not. He did, no doubt, become a trustee within the wide definition of that term in s. 6 of the Act but there are many reasons why he should not be regarded as a " trustee of the estate of the taxpayer " as that expression is used in s. 216. In the first place, although he may conveniently be designated for the purposes of the *Bankruptcy Act* as the trustee of the estate of the debtor, the assets which came to his hands did not, strictly, constitute the estate of the deceased. The estate which passes to the official receiver upon the making of an order for administration under s. 155 is constituted by the " property of the bankrupt " which in any particular case may or may not comprehend the whole of the estate of the deceased. Further, the " property " of the bankrupt having vested in the official receiver, the executors or trustees of the deceased debtor cease to have any interest in the assets comprehended by that expression except to the extent to which a surplus may result after completion of the bankruptcy administration. Nor does the official receiver represent the debtor in any real sense. Under par. (*a*) of s. 216 the commissioner is to have the same powers and remedies against the trustee in respect of the taxable income of the deceased *as he would have against the deceased if he were still living.* That is to say the trustee may be assessed and tax may be recovered from him. By par. (*b*) he is required to make such returns as the commissioner requires and under par. (*c*) he is to be subject to additional tax to the same extent as the taxpayer would be if he were still living. The character

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of these provisions suggests that, while they are appropriate to impose obligations upon *representatives* of the deceased debtor, they were not intended to treat the official receiver, in his capacity of trustee of the bankrupt estate of a deceased taxpayer, as the trustee of the estate of the deceased taxpayer. In s. 216 " estate of the taxpayer " has its natural meaning, i.e., the estate that passes to his personal representatives on death.

These considerations are sufficient to dispose of the contention that the appellant can be regarded as the trustee of the estate of the deceased taxpayer within the meaning of s. 216 and that this is the correct conclusion is fortified by a brief examination of the effect of the section if the true view were otherwise. Where death has intervened before assessment to tax the problem of recognizing what powers and remedies the commissioner would have had if the taxpayer were still living is reasonably easily solved. But what is the position if both death *and* an administration order under s. 155 of the *Bankruptcy Act* intervene ? In such circumstances, if the section applies to a case such as the present, what assumption is to be made for the purpose of ascertaining the powers and remedies which the commissioner would have had if the deceased were still living ? Is it to be assumed that if the deceased were still living he would be a bankrupt, in which case the commissioner could recover tax only by proving in his estate and receiving the priority specified in s. 221 (*b*) (i) of the *Income Tax and Social Services Contribution Assessment Act* ? Or is it to be assumed that an administration in bankruptcy would not have intervened and that, therefore, the commissioner may recover outstanding tax by action against the official receiver as he might have against the deceased if he were still alive ? Both hypotheses are, of course, completely artificial and there is no reason why either should be preferred to the other. The considerations which are evident provide cogent grounds for thinking that s. 216 was intended to deal with a situation brought about by the death of a taxpayer by subjecting the trustees of his estate to the like powers and remedies as would have been available to the commissioner against the taxpayer if the crucial event which is designed to bring the section into play had not occurred. But beyond this the section does not go; it does not authorize the notional annihilation of events other than death for the purpose of measuring the rights and powers of the commissioner. Moreover, notwithstanding the making of an administration order under s. 155 of the *Bankruptcy Act*, the executors of a deceased person remain the trustees of his estate. Against whom, in these circumstances, are the powers and remedies of the

commissioner available ? On the respondent's argument they would be available against both the official receiver and the executors and this, it appears to us, is not a result which the language of the section is designed or intended to produce.

The foregoing observations may appear to suggest that neither s. 216 nor s. 221 (1) (i) authorized the making of the assessments in question but the assessments may have been justified under other provisions of the Act: (cf. *Cadbury-Fry-Pascall Pty. Ltd.* v. *Federal Commissioner of Taxation* (1)). But whether this be so or not liability under the assessments has been admitted and the only question which arises in this appeal is the question of the extent of the priority, if any, to which the respondent is entitled. Moreover, since this is not an appeal against the assessments the question of their validity is not open.

The reasons which have been given lead, in the result, to the conclusion that the respondent was not entitled to a charge by virtue of the provisions of s. 216 and that he is not entitled to the priority which s. 221 (*b*) (i) affords in cases where a sequestration order has been made. Accordingly we are of the opinion that the respondent's proof of debt should be permitted to rank *pari passu* with the ordinary unsecured creditors of the deceased and accordingly the appeal should be allowed and the cross-appeal dismissed.

Appeal allowed with costs. Order of Mansfield S.P.J. of 31st March 1955 discharged. In lieu thereof order that the motion be dismissed with costs.

Cross-appeal dismissed with costs.

Solicitors for the appellant, *O'Shea, Corser & Wadley*, Brisbane.

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.

(1) (1944) 70 C.L.R. 362, at pp. 380, 381.